IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No 430 of 1998

For Approval and Signature:

HON'BLE MR.JUSTICE H.H.MEHTA
and
HON'BLE MR.JUSTICE SHARAD D.DAVE

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

MAGANBHAI RUPSINH VANJARA

Versus

STATE OF GUJARAT

Appearance:

1. Criminal Appeal No. 430 of 1998
MR BS SUPEHIA for Petitioner No. 1
THROUGH JAIL for Petitioner No. 1
Mr.P.R.Abichandani, learned A.P.P. for Respondent No. 1

CORAM : HON'BLE MR.JUSTICE H.H.MEHTA
and
HON'BLE MR.JUSTICE SHARAD D.DAVE

Date of decision: 10/10/2003

C.A.V. JUDGEMENT

(Per : HON'BLE MR.JUSTICE SHARAD D.DAVE)

This appeal is preferred against the judgment and order dated 06.05.1998 in Sessions Case no. 30/1997 of learned Addl.Sessions Judge, Surat wherein the appellant was convicted under Sec. 447 and Sec. 302 of Indian Penal Code (for short I.P.C.) and was sentenced to rigorous imprisonment for two months and fine of Rs.300/i/d simple imprisonment for 15 days for the offence under Sec. 447 of I.P.C. and rigorous imprisonment for life and fine of Rs.1,500/- i/d simple imprisonment for six months for the offence under Sec. 302 of I.P.C. The appellant-accused was given the benefit of set-off and both the sentences were ordered to run concurrently.

2. The facts leading to the present case are as under :

The complainant-deceased Zaverbhai Kalidas Konkani was residing at village Parvat, Nr.Ankur Apartment, hutments, Limbayat, Surat and was doing the work of taking care of sugarcane crop in vadi of Nareshbhai which is situated near vadi of Bhagubhai. On the day of incident i.e. on 23.10.1996 at about 7.00-8.00 p.m. the complainant was having dinner with his wife Savitaben and at that time Chetanbhai and Hiraben were also present. At that time, Maganbhai Rupsingbhai Vanzara (present appellant) came and attacked the complainant with Rampuri knife and due to such attack the complainant sustained injuries on chest, near neck, on the back and right shoulder. The complainant's wife and others rescued the complainant from further attack and the accused-appellant ran away. According to the complainant, the reason for such attack was that the sister of the accused-appellant Kaliben went to her village before six years and due to this there were enemical relations between the complainant and the accused-appellant.

It is the case of the prosecution that the complainant was taken to Surat Civil Hospital for treatment. P.S.I. Shri Tank was incharge of investigation in Limbayat police station and at 11.00 p.m. he came to know that some altercation has taken place in Parvat village and injured is admitted in new civil hospital. On receiving such information, he went to New civil hospital and recorded the complaint of the complainant-deceased. Complaint was registered and investigation was handed over to Shri Tank. The

investigating officer recorded statements of various witnesses, prepared the inquest panchanama, panchanama of scene of offence, got the post-mortem report prepared and on coming to the conclusion that there was ample evidence against the accused, filed a chargesheet in the court of J.M.F.C.Surat. The case, however, being triable exclusively by the court of Sessions and was, therefore, committed to the court of Sessions. It was registered as Sessions Case no. 30 of 1997. The charge was framed against the accused for offences under Sec. 447, 302 of I.P.C. and Sec. 135 of Bombay Police Act.

3. The prosecution examined following witnesses :

(1) P.W. 1 Savitaben Zaverbhai Konkani exh. 23,

(2) P.W. 2 Chetanbhai Chhaganbhai Vasava exh. 24,

(3) P.W. 3 Miraben Chetanbhai Vasava exh. 25,

(4) P.W. 4 Kalpanaben Zaverbhai exh. 26,

(5) P.W. 5 Bhavansing Kalidas Konkani exh. 27,

(6) P.W. 6 Dr.Kiran Ratilal Pansuriya exh. 28,

(7) P.W. 7 Vishnubhai Dhirajbhai Rathod exh. 29,

(8) P.W. 8 Sushilaben Gordhanbhai Patel exh. 30,

(9) P.W. 9 Kaliben Paramsinh exh. 31,

(10) P.W. 10 Vijaybhai Bagesh exh. 32,

(11) P.W. 11 Krushnakant Laxmishankar Tiwari exh. 33,

(12) P.W. 12 Pravinbhai Arvindbhai Patel exh. 35,

(13) P.W. 13 Dr.Vitrag Dhansukhbhai Shah exh. 43,

(14) P.W. 14 Rahimkhan Hushenkhan Tank exh. 47, and

(15) P.W.15 Nathusinh Dajiji Bihola exh. 50.

The prosecution has also produced relevant documentary evidence like post-mortem notes, inquest panchanama, panchanama of scene of offence etc.

4. Further statement of the accused was recorded under Sec. 313 of Criminal Procedure Code wherein the accused denied the case of the prosecution but did not

examine any witness or produced any documentary evidence in support of his case.

5. After considering the evidence led by the prosecution and hearing the learned advocates for the parties, the trial court came to the conclusion that the present appellant is guilty of the said offence and convicted and sentenced him to undergo the sentences as stated above. Being aggrieved by the said judgment and order, the present appeal is preferred by the original accused.

6. Mr.Supheia learned advocate for the appellant-accused has submitted that in this case the complaint/dying declaration is not creditworthy and it should not be acted upon. Whether facts stated by the deceased were probable or improbable is required to be given consideration in view of the fact that in the said complaint-dying declaration there is a mention of motive/reason of the alleged crime committed by the appellant-accused. Moreover, there is a material contradictions in the said dying declaration-FIR as well as panchanama of scene of offence. The panchanama of scene of offence is produced at exh. 17 which shows that panchanama of scene of offence is 25ft. away from the oshri portion whereas the dying declaration-complaint states that incident took place in the oshri portion where deceased along with wife were having their food. Moreover, complaint-dying declaration refers presence of wife of deceased whereas the said Savitaben P.W. 1 at exh. 23 does not support the case of the prosecution and says that she was at home at 8.30 p.m. and her husband went to graze the cattle. She further stated that she is not aware as to who has beaten her husband. When her husband did not return to home, they went to search him and saw him lying in the "chikoo vadi". Thereafter she went to inform Sushilakaki about her husband. Therefore, there is a material contradiction between the complaint-dying declaration and facts given by the wife of deceased and therefore benefit of doubt should be given to the present accused-appellant. In further submissions, it is submitted that it is practice that when accused is arrested, arrest panchanama is prepared. However, in this case no arrest panchanama has been drawn. The clothes of the appellant-accused were also not recovered from the person. Relying on the deposition of P.W.7 Vishnubhai Dhirajbhai Rathod exh. 29, it is submitted by the learned advocate that, he saw handle of knife in the pocket of present appellant. If the witness had seen the handle of knife in pocket of present appellant, he would have also seen the blood on the

handle of knife. Nothing comes on record by the prosecution.

7. Relying on the deposition of P.W.4 Kalpanaben daughter of deceased at exh. 26, she says that when she came to the house, she came to know that her father has been murdered. Who murdered her father was not known to her. Though not clearly admitted by this witness, it appears that at her instance, P.W.8 Sushilaben Gordhanbhai Patel informed the police regarding the murder which took place in the vadi. Against the aforesaid deposition, relying on the deposition of Sushilaben Gordhanbhai Patel exh. 30, in the submissions of learned advocate for the appellant-accused, Kalpanaben daughter of deceased has informed this witness that one person by name Magan has inflicted knife blows on her father and at her request, this witness made a phone call to police station. Therefore, the prosecution ought to have produced some evidence with regard to information of phone call received from Sushilaben. No such information is brought on record by the prosecution and therefore also benefit should go to the accused.

8. The yadi to Executive Magistrate, exh. 49 is not readable at all and therefore also benefit should go to the appellant. Relying on certain aspects which, according to us are not material, Mr.Supheia learned advocate for the appellant wanted to impress upon us that benefit of doubt should be given to the appellant.

9. Against the aforesaid submissions, Mr.P.R.Abichandani learned A.P.P. for the State has submitted that in this case wife of the deceased Savitaben P.W. 1 has turned hostile. Eye witnesses to the incident Chetanbhai Chhaganbhai Vasava p.w.2 and Miraben Chetanbhai Vasava p.w. 3 have also turned hostile. Even brother of deceased P.W.5 Bhavansing Kalidas Konkani at exh. 27 has also turned hostile. All the panchas to the various panchanamas have also turned hostile. Under the circumstances, the only reliable evidence produced on record is complaint at exh. 48 which can be said to be dying declaration of the deceased, in view of the fact that before dying declaration of the deceased was recorded, he has died in the hospital. For this purpose, he has relied on deposition of Dr.Vitrag Dhansukhbhai Shah p.w. 13 exh. 43, P.S.I. Rahimkhan Hushenkhan Tank exh. 47, FIR/DD recorded on 23.10.96 exh. 48 and deposition of Investigating Officer p.w. 15 P.I.Shri Nathusinh Dajiji Bihola exh. 50. By reading out certain depositions of hostile witnesses along with certain supporting

witnesses, learned A.P.P.Mr.Abichandani for the State has submitted that this is a fit case wherein this court should not interfere with the judgment and order of the learned trial court and should dismiss the appeal of the present appellant-accused.

10. We have gone through the evidence on record and learned advocates of the parties have also read the evidence which is relevant to them. At the outset, it should be noted that P.W. 1 wife of deceased by name Savitaben, P.W. 2 Chetan C Vasava, his wife P.W. 3 Miraben Vasava, P.W.5 brother of deceased Bhavansinh Kalidas, P.W. 7 Vinubhai D Rathod, P.W. 9 Kaliben Paramsinh on whose account alleged murder took place and P.W. 11 K.L.Tiwari panch of discovery of weapon have turned hostile. P.W.4 Kalpanaben Jhaverbhai daughter of deceased, P.W.8 Sushilaben G Patel have deposed neither in favour of prosecution nor in the favour of the defence. Therefore, we have to lend our support on the deposition of P.W.13 Dr.V.D.Shah and P.W.14 P.S.I. R.H.Tank and P.W.15 P.I. N.D.Bihola and on certain documents such as complaint, inquest report, scene of offence, P.M.report, F.S.L. report etc. etc.

11. So far as P.M.notes exh. 21 is concerned, deceased was having following external injuries :

1. Stiched wound 3.5cm long oblique on front of right chest medial end 6cm. right in midline 11 cm below midclavicular points in 3rd I.C.S.
2. Incised stab wound 3.2 x 1 cm chest cavity deep obliquely placed on right outer back of chest lower part 28 cm below tip of shoulder and 15 cm right to midline lower end medialloy 113 cm from right near margin clean-cut angles aente.
3. Incised stab wound 6x1.5cm.xmuscle deep obliquely placed on left elian forra lower medial end 10 cm left fo midline 4 cm above the left anterior superior iliar spine. Spindle shaped wound has clean-cut margin and both angles ante.
4. Intercostal drainage the would on right 3x0.5cm on lateral chest 11 cm below axilla in anterior ancillary line.

The deceased was also having following internal injuries as mentioned in para 20 of the P.M.report.

1. Internal injuries : corresponding to injury no. 1 wound has gone into right chest cavity through 3rd I.C.S. cut the right ride of pericardium and gone through and through the right anium of heart

and before it has cut the anterior border of right lung upper lobe.

2. 350 gm. rt.chest cavity fluid and clotted blood present.

3. Pericardial full of blood (liquid and cotton).

The cause of death as stated by the doctor was shock and haemorrhage following stab injuries to heart lung and liver.

All the aforesaid injuries were Anti Mortem in nature.

12. It is to note that by making endorsement on 07.10.97, the learned advocate for the accused has made endorsement to the effect that document of scene of offence at sr.no. 2, inquest panchanama at sr.no.3, panchanama of clothes of deceased at sr.no.5, discovery panchanama of weapon at sr.no.6, Post-mortem note at sr.no.7, F.S.L.report along with serological report at sr.no. 8 may be exhibited and also endorsed that document at sr.no. 4 (regarding panchanama of discovery of weapon) should be exhibited. Therefore, all the other documents were exhibited without any objection from the appellant-accused. If we peruse the FSL report, all the articles were having stains of the blood of deceased and having `A' blood group.

13. Now if we peruse the deposition of Dr.Vitrag Dhansukhbhai Shah, he says that while he was on his duty on 23.10.96 at about 12.00 night one person by name Zaverbhai Kalidas Konkani was brought to his ward. At about 12 midnight, the police got his endorsement regarding the consciousness of the patient on the yadi to the Executive Magistrate for recording the dying declaration. Before making such endorsement he ascertained that patient was not in coma. At that time, the police recorded the complaint of the patient and at that time patient was conscious. He made his signature on two copies of the yadi. At about 1.00 a.m. on 24.10.96 when he again examined the patient, he was unconscious and therefore he also made endorsement to that effect. The witness produced carbon copy of the yadi at exh. 44 on which he has endorsed regarding the consciousness of the patient at 12.00 midnight and unconsciousness of the patient at 1.00 a.m. on 24.10.96. In cross-examination, the doctor has admitted that he cannot say without referring to the papers whether painkiller injuction was given to the patient or not. However, he stated that when the complaint was recorded by the police, in clear terms the witness stated that the patient was conscious that means he was able to speak.

14. To the misfortune of the patient, when he went to the stage of unconsciousness, he never regained consciousness and he died before the Executive Magistrate came for recording the dying declaration. Under the circumstances, the complaint came under scrutiny of the trial court.

15. The trial court in our opinion has rightly relied on the dying declaration of the deceased. We find very cogent reasons by the trial court while going through the judgment at para 28 to 32. The trial court has also rightly discussed the principles as laid down by the Apex Court as well as this court regarding the dying declarations from para 17 to 20 of the judgment.

16. So far as P.W. 14 Mr.R.H.Tank is concerned, he has stated that while he was working as P.S.I. at Limbayat police station, on 23.10.96 between 20.00 to 24.00 hrs. he was investigation incharge. At about 22.00 hrs. he received message that in the Parvat village some scuffle had taken place in Vadi and injured was taken to civil hospital, Surat. Thereupon, he went to the civil hospital, Surat for taking the complaint and he recorded the complaint of Zaverbhai Kalidas Konkani. He found the patient in conscious state and he prepared report to the Executive Magistrate and obtained endorsement of the Medical Officer present at the time. He also endorsed that doctor was present at the time. He completed the complaint of the injured at 00.05 hrs. Thereafter, he sent the complaint for recording FIR along with his yadi. It is stated that he recorded complaint as per the say of concerned complainant and obtained his left hand thumb mark. The said complaint FIR is produced at exh. 48. He identified the signature on the yadi so sent for the Executive Magistrate for recording the dying declaration of the injured witness at exh. 49. When the yadi was sent to Executive Magistrate, the patient was in conscious state and when he was reexamined he was in unconscious state. The doctor has made endorsement that within no time the patient died. Thereafter, P.W.14 P.S.I.Rahimkhan Tank went to the police station. He was given further investigation to be carried out. Thereafter, he recorded the panchanama of scene of offence exh. 17, seized the blood stained soil as sample, prepared inquest panchanama exh. 18 and handed over further investigation to P.I.Shri N.D.Bihola.

In cross-examination the witness admitted that he has not obtained the signature of the doctor on the complaint exh. 48. The witness started recording the complaint at about 11.30 p.m. and obtained the endorsement of the doctor after complaint was recorded.

Lastly, he denied that he obtained toe mark of the deceased while he was unconscious.

17. The panch witness to the seizure of the muddammal article knife is at p.w.12 Mr.Pravinbhai Arvindbhai Patel. He stated that he was called by the Limbayat police to stand as panch. The police took one signature of the witness in the police station. At that time there was no other person with the police. For some time, they went in police jeep and one person who was in the jeep was showing the road to the police and they went to Parvat village. He saw knife in the hands of the accused. He cannot say from where he took out. The witness identified his signature on the panchanama exh. 34 and also identified his signature slip on the muddammal article knife.
In the cross-examination of the witness, nothing material comes out on record.

18. The deposition of P.W. 8 Susilaben Gordhanbhai Patel also renders support to the prosecution case. She says that Kalpanaben daughter of the deceased was working at her place. On the day of the incident, she came to her house and stated that knife blow has been given to her father. Thereupon, witness gave a ring to the police. Kalpanaben stated that one person by name Magan has given blow of knife to his father. The witness does not know who is this Magan. In cross-examination of the witness, she stated that she cannot say how many persons by name Magan are staying in the village.

19. P.W. 7 Vishnubhai Dhirajbhai Rathod has turned hostile. He has admitted in his cross-examination by the learned A.P.P. that he saw handle of the knife in the pocket of the accused Magan. On this point, there is no cross-examination by the learned advocate for the accused.
20. In light of the depositions of Sushilaben, if we peruse the deposition of Kalpanaben daughter of Zaverbhai at exh. 26, she says that she did not know about incident regarding murder of her father as she was at the house of Sushilaben. When her mother came to the house of Sushilaben, she came to know that her father is murdered. She says that she cannot say who murdered her father, and whether his father was having some enemical relations with third party or not. The witness was not cross-examined by the learned advocate for the accused.
21. In the whole judgment, we have come across that the trial court has observed that the matter has been settled and therefore some witnesses were not cross-examined by the learned advocate for the appellant.

It is also possible that because of the compromise, the brother of the deceased, wife of the deceased and close relatives of the deceased have turned hostile but the depositions on record have confirmed that murder has taken place and the accused is present appellant.

22. The net result of the above discussion is that the prosecution has proved beyond reasonable doubt that the appellant has caused death of deceased Zaverbhai and is rightly convicted under Sec. 302 and 447 of I.P.C. Having regard to the totality of the facts and circumstances of the case, we do not find any substance in the appeal and the appeal is liable to be dismissed.

23. For the foregoing reasons, this appeal deserves to be dismissed. Accordingly it is dismissed and the judgment and order dated 06.05.1998 in Sessions Case no. 30/97 rendered by Addl.Sessions Judge, Surat is hereby confirmed. Muddammal to be disposed of in terms of directions given by the learned Addl. Sessions Judge, Surat in the impugned judgment.

(H.H.MEHTA, J)

(SHARAD D DAVE, J)

srilatha